94-1785

SUPREME COURT OF THE UNITED STATES

October Term, 1995

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

v.

ROBERT F. LUNDY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The question applies to taxpayers who petition the Tax Court under the following circumstances: (1) a taxpayer overpays, usually as a result of overwithholding, the amount of tax owed, (2) the taxpayer is delayed in filing his return, (3) the IRS mails a Notice of Deficiency to the taxpayer after two but before three years from the due date of the return, (4) the taxpayer subsequently files a tax return claiming a refund within three years of the original due date of his return and (5) the taxpayer subsequently files a petition in the Tax Court seeking a redetermination of the asserted deficiency and a refund of his overpayment.

Whether, under these circumstances, the IRS can shorten the statute of limitations on claiming a refund in the Tax Court to less than three years by mailing a Notice of Deficiency to a taxpayer more than two but less than three years from the due date of his return.

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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STATEMENT OF THE CASE[1]

Federal taxes were withheld from the income of Robert F. Lundy (hereinafter "Taxpayer") for the 1987 taxable year. Like many Americans, it was Taxpayer's custom and practice to permit the petitioner (hereinafter "IRS") to overwithhold from his income so that he never owed the IRS any taxes on April 15th and was, in fact, due a refund. As a practical matter, each year, Taxpayer was making an interest free loan to the IRS. (A. 68, 82).

Taxpayer was led to believe, by the IRS officials with whom he dealt, that he had a full three years in which to file his return. Taxpayer had past experience with the IRS on this very subject. Previously he had filed returns claiming a refund near the end of the

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[1] All "A" references are to pages in the Appendix to Taxpayer's main brief in the court of appeals which included the trial court record. Appellant's Brief, App. A., *Lundy v. IRS*, 45 F.3d 856 (4th Cir. 1995) (No. 94-1260).

All "L" references in this brief are to Taxpayer's Lodging which has been lodged with the Clerk for the convenience of the Court. The included documents are cross-referenced to where they appeared in the record in the court of appeals. *See* Appellant's Addendum C, *Lundy* (No. 94-1260). A few newspaper articles from the 1995 tax filing season post-dated the proceeding below.

three-year grace period and had received his refund in full. (A. 69-70, 86).

From 1988 through 1990, Taxpayer suffered a number of personal and health problems. He was hospitalized after a car accident, dealt with various family problems, and was involved in a divorce.[2]

During the period June 1988 until September 1990, the parties conducted correspondence that is typical of correspondence between a citizen and the IRS. The IRS sent Taxpayer a form letter. Taxpayer replied with a detailed and considered response. The IRS sent still another form letter which completely ignored the correspondence of Taxpayer. (A. 75-76).

The IRS computers generated a Notice of Deficiency, (L 1), to Taxpayer on September 26, 1990. (A. 13, 52). In the Notice of Deficiency, the IRS claimed that (in addition to the $10,131.11 that had been withheld from his wages) he owed $13,806 in taxes, $2,192.55 in penalties, and interest thereon. The Notice led Taxpayer to believe that he had only two choices, either to pay the amount demanded or to file a petition in the Tax Court. (A. 77). Nowhere in the Notice did the IRS warn Taxpayer that the consequence of filing a petition in the Tax Court would be to forfeit his refund. (L 1).

Taxpayer mailed his 1987 tax return on December 22, 1990, and filed a petition in the Tax Court on December 28, 1990. (L 2). On February 15, 1991, the IRS filed its Answer. This Answer did not raise a limitations defense.

On March 12, 1991, the IRS acknowledged that it had been notified of Taxpayer's petition in the Tax Court. (A. 58). On March

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[2] The Job-like difficulties that impeded Taxpayer, (A 69-73), are not repeated in detail here. Implying negligence on the part of Taxpayer is simply diversionary. (Pet. Br. 33). Taxpayer did not become more negligent in the third year than in the second. The question before the Court is the length of the period afforded to taxpayers as a matter of legislative grace. Is it three years, as the IRS consistently tells the public, or two years, as the IRS has been urging somewhat inconsistently upon the courts?

19, 1991, the IRS sent Taxpayer a letter requesting him to gather, organize, and explain more than 150 pages of documents. (A. 55, 59-60). On May 15, 1991, the IRS sent Taxpayer a letter stating that in order to receive a refund "the Taxpayer must establish that all requirements of the law had been met." (A. 61). However, this letter did not raise a limitations defense. The only requirement which Taxpayer was asked to meet was to provide evidentiary support for the deductions that he was claiming on his 1987 return. (A. 61).

In a conference call with the Tax Court judge, counsel for the IRS indicated that it was her understanding that a settlement had been reached which involved a refund to the Taxpayer.[3] (A. 56).

On February 3, 1992, the IRS wrote the Taxpayer the following:

> Amount to be refunded to you if you owe no other obligations $3,537.
>
> You may have already received this check. If not, please allow two weeks for it to be mailed to you unless there are other matters pending which could *postpone* your refund. (emphasis added) (A. 62).

The IRS filed a Motion to Amend its Answer raising the statute of limitations defense, for the first time, on March 17, 1992 (less than five days before the call of the calendar). This motion was granted over Taxpayer's strenuous objection. (A. 88, 112.) The Taxpayer's check is still being "postponed."

A few months later the Commissioner seemed to have changed her mind. In a *Washington Post* report that appeared on October 4, 1992, then Commissioner Shirley B. Peterson said that: ". . . if you have a refund coming, you may lose it. The IRS estimates that a

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[3] During the examination of Taxpayer's return and the negotiations which followed, involving concessions on both sides. (A. 89). Taxpayer and the IRS agreed that a discrepancy of $778.00 existed between the assessment made pursuant to [Taxpayer's 1987] return of $6,954.00 and the "corrected income tax liability" of $7,372.00. The IRS admitted that income taxes were withheld from the Taxpayer in 1987 in the amount of $10,131.11. In addition, Taxpayer conceded an "addition to tax" of $369.00. (A. 13, 89-90).

third of non-filers actually have money coming to them. The law says that a refund must be claimed within three years of the date the return was due. If a refund was not claimed, the government gets to keep it." (L 6).

The Fourth Circuit was asked to take judicial notice of the fact, that whenever the IRS seeks publicity about the filing season or about its non-filer program, one of the inducements that is offered is that if a citizen is due a refund, he will receive one if he files a tax return within three years of the due date of the return from which the refund is calculated. For example, in a press release issued in March 1994, the IRS said: "In particular, the IRS urges those expecting refunds to file before it's too late. Nearly one-quarter of late filers who have sent in prior year returns received funds. Though there is no penalty for filing a refund return after the regular April 15 deadline, a refund is lost forever on a return filed more than three years late. That means refunds for 1990 must be claimed by April 15, 1994." (L 30).

Last year, in a report that ran in the *New York Times* on February 27, 1994, the present Commissioner, Margaret Milner Richardson, said: "More than one-third of the nation's non-filers are owed refunds. To claim a refund, taxpayers must file a return within three years [of the due date of the return]." (L 3).

On January 30, 1995, the Court of Appeals for the Fourth Circuit reversed the holding of the Honorable Herbert I. Chabot of the Tax Court that the Taxpayer had overpaid his 1987 income tax, but such overpayment was not refundable on the ground that the statute of limitations had run on the period in which the Tax Court could make such a determination.

The IRS has been made aware in this litigation that a serious difference exists between its communications to the public (three years to file claims for refund) and its litigation posture (two years). Yet, the publicity generated by the IRS during the 1995 tax filing season would lead a reasonable person to believe that the IRS had acquiesced in the decision of the Fourth Circuit and agreed with Taxpayer that taxpayers have three years to claim a refund. All publicity aimed at late filers suggested to them that there was a good chance that they were owed a tax refund which could be obtained if

they filed within three years of the due date of the return. (L 15-20). No one at the IRS objected to the information provided in national and regional newspapers and in the nationally syndicated cartoon *Cathy*, that late filers have three years in which to seek their refund. (L 20a).

The IRS continues to state without contradiction in the press that the period for seeking refunds of overpayments of taxes is three years. Even after the IRS filed its petition for certiorari in this case, a high-level IRS official, in publicizing its late-filer program, was quoted as saying: "[A]nyone who waits more than three years will lose [their] refund, ..." Neil MacFarquhar, *Delinquents Get to See Softer Side of IRS*, N. Y. Times, June 18, 1995, § 1, at 30. (L 8).

SUMMARY OF ARGUMENT

The last substantive change in the statute of limitations on claiming refunds in the Tax Court was made in 1942. The statute has existed in its present form since 1954. Yet, it was not until 1992 that the Tax Court, for the first time, held that a taxpayer who filed his return less than three years from the due date of the return was deprived of his refund.

The Tax Court describes the "intricate" statute that permits the IRS to confiscate the refunds of unsophisticated taxpayers as having a "plain meaning." Yet, the meaning of the statute has not been plain to the administrative agency charged with its interpretation. In a revenue ruling, in interviews with IRS officials, including Commissioners, in official publications and in press releases, the IRS has always told, and still tells, taxpayers that they have three years. (L 3-39).

The statute of limitations on claiming refunds of overpayments of taxes is found in I.R.C. § 6511.[4] It is a comprehensive statute, intended to apply in a variety of different situations. The focus of

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[4] All references to "section," "§," or "I.R.C. §" are, unless designated otherwise, references to sections of the Internal Revenue Code (1986), 26 U.S.C. § 1 et seq.

this case is on the portion of the statute that limits claims of overpayments by late-filers. Section 6511(a) contains the limitation on the time period when a late return claiming a refund of an overpayment can be filed. Section 6511(b) contains the limitation on the amount of the refund that may be allowed.

Section 6511(a) states that a timely claim for refund must be filed within three years of a tax return. In this case it has been stipulated that a return was filed. As Taxpayer's return is also his claim, Treas. Reg. § 301.6402-3(a)(5), the return and claim were filed within three years of each other because they were filed on the same date. Next, it must be determined what is the limitation on the amount that Taxpayer can recover. Since Taxpayer filed his claim within three years of the date of the return, he was entitled to a refund of the amount of the overpayment from taxes paid in the three years preceding the filing of his 1987 return. I.R.C. § 6511(b)(2)(A). His overwithholding was deemed paid on April 15, 1988. I.R.C. § 6513(a). He filed his return in December 1990. Therefore, he is entitled to a refund of the entire amount of his overpayment.

At the time the Tax Court was created in 1924, it did not have refund jurisdiction. Its jurisdiction was limited to determining deficiencies. This led to an unfortunate bifurcation of litigation because a taxpayer would have to file a petition in the Tax Court to get a proposed deficiency reduced, and then file a complaint in a district court or in the Claims Court to obtain a refund of overpaid taxes for the same taxable year.

To eliminate this bifurcation, Congress authorized the Tax Court to determine overpayments. I.R.C. § 6512(b)(1). When it granted refund jurisdiction to the Tax Court, Congress waived the prerequisite, applicable to refund suits in the district courts and the Claims Court, that an administrative claim for refund be filed with the IRS. I.R.C. § 6512(b)(3)(B). As a taxpayer might not know for many years after the IRS mailed a Notice of Deficiency that he was, in fact, due an overpayment, the filing requirement was eliminated. However, in order to prevent stale claims, Congress kept a limitation on the amount that could be refunded by incorporating the general statute of limitations by reference.

Unfortunately, current § 6512(b)(3)(B), which incorporates current § 6511, is not written very "plainly." There are four phrases to be construed in this statute: "No such credit or refund shall be allowed . . . unless . . . such portion was paid . . . [1] within the period which would be applicable under § 6511(b)(2) . . . [2] if on the date of the mailing of the notice of deficiency a claim had been filed [3] (whether or not filed) [4] stating the grounds upon which the Tax Court finds that there is an overpayment . . . ."

The phrase "(whether or not filed)" has been interpreted by the private tax bar, in learned treatises, by tax law professors, and by the Tax Court itself as meaning "could have been filed." Under that construction, a taxpayer who *could have* filed a valid claim on the date that the Notice of Deficiency was mailed by the IRS, because the three-year statute remained open, obtains the benefit of the Tax Court's refund jurisdiction. That interpretation makes sense of what Congress did. The incorporation by reference of § 6511, the general statute of limitations, makes clear that Congress did not intend that a different statute of limitations apply in the Tax Court. If it had, it would have drafted a separate provision applicable to that court only. Since a taxpayer is required to file a petition and not an administrative claim for refund, a reference date for application of the statute of limitations to Tax Court petitioners was needed. The statute of limitations is tolled on the date that the Notice of Deficiency is mailed. Taxpayer was mailed a Notice of Deficiency on September 26, 1990, well within three years of the date his taxes were paid. He is entitled to his refund.

The IRS, on the other hand, has spun a theory from the clause "if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed)," that makes nonsense of what Congress did. The construction urged by the IRS is dependent upon misconstruing the third phrase of the clause and ignoring the fourth. The IRS position is totally dependent on an acceptance of the notion that the mailing of the Notice of Deficiency by the IRS constitutes the "deemed claim" for refund filed by Taxpayer. There is no support for this contention in the statutory language. By what alchemy does the incantation of the phrase, focused on by the IRS, permit the IRS to turn its menacing form letter, (L 1), into the claim for refund filed by the taxpayer? It was not a document filed by Taxpayer. The Notice does not state " . . . the grounds upon which

the Tax Court finds there is an overpayment . . .. " Moreover, even if this "deemed claim" argument were accepted, the timely filed return/claim of Taxpayer should be treated as amending or superseding the "deemed" or "imputed" claim so that it contains the grounds required by the statute and conforms with the Treasury Regulations. While the IRS employed Taxpayer's return for purposes of determining his tax deficiency or overpayment, it treated it as a nullity for purposes of compliance with the statute of limitations.

Under the construction of the IRS, one party to a dispute, the IRS, is permitted to shorten the statute of limitations of the other party, the Taxpayer, at will. This supposed authority is exercised in a completely arbitrary and capricious manner. It can, but does not always, result in a shorter statute of limitations in the Tax Court than in the other refund forums. Even as applied to Tax Court petitioners, the result is that there is not one point in time at which the statute of limitations can be determined to have run, but 365 points in time, depending on the whim of the IRS. (L 47).

It is difficult to follow the argument of the IRS that taxpayers who file petitions in the Tax Court are negligent while those who file complaints in other courts are not. After all, the in terrorem Notice of Deficiency (L 1) mailed by the IRS invites taxpayers to contest the Notice by filing a petition in the Tax Court, but does not advise the unsophisticated taxpayer that if he accepts such invitation, his overpayment will be confiscated. What is there about the behavior of this taxpayer that permits the IRS to confiscate his refund when, had the IRS mailed its Notice of Deficiency within two years of the due date of Taxpayer's return, or had Taxpayer filed his return on September 25, 1990 (the day before the Notice of Deficiency was mailed) or had he not accepted the invitation of the IRS to file a petition in the Tax Court, he would have received a check?

The IRS has been unable to advance any policy reason that would support its construction of § 6512(b)(3)(B) which results in a shorter statute of limitations in the Tax Court than the other refund forums. Its position has been based solely on a formalistic and strained interpretation of the statute. It now urges that all late-filers, not just those that petition the Tax Court, are subject to a two-year statute of limitations. Therefore, the IRS argues that Tax Court

petitioners are in no worse position than other taxpayers. The IRS relies half-heartedly on the Ninth Circuit Court of Appeals decision in *Miller v. United States*, 38 F.3d 473 (9th Cir. 1994). That case held that late-filers who file a refund suit in a U.S. district court or in the Court of Federal Claims (hereinafter "Claims Court") must have filed their return showing an overpayment within two years of the due date in order to obtain a refund. *Miller* is patently incorrect and the IRS so recognized while that case was pending. The IRS conceded error in its brief to the Ninth Circuit, citing its own Revenue Ruling 76-511 which provides for a three-year period in which to file a late return/claim for refund. Last April it told this Court it was reconsidering this ruling but it has not announced any decision at this time. The reality is that taxpayers who file complaints in district courts, or in the Claims Court, or who ignore the Notice of Deficiency altogether, and simply await their refund checks, are getting the benefit of three years, and those who file petitions in the Tax Court get anywhere from two to three years depending on when the IRS computers burp out a Notice of Deficiency

ARGUMENT

A TAXPAYER FROM WHOSE WAGES THE IRS HAS OVERWITHHELD TAXES IS ENTITLED TO A REFUND OF HIS OVERPAYMENT IF HE FILES A LATE RETURN WITHIN THREE YEARS OF THE ORIGINAL DUE DATE OF THAT RETURN

I. The Tax Court, in Construing a Statute Which Has Been Substantially Unchanged for a Half Century, for the First Time in 1992, Denied a Refund to a Taxpayer Who Actually Filed a Refund Claim Within Three Years of the Due Date.

A brief historical perspective is necessary to place this dispute in its proper context. The last amendment of substance to the statute of limitations on claiming refunds was made in 1942. The statute has existed in its present form since 1954. Until 1992 , no taxpayer who filed a claim for refund within three years of the return's due date was denied a refund by the Tax Court.

Although two early cases suggested the possibility, the precedent for the recent explosion of cases upholding a shorter

statute of limitations for claiming refunds in the Tax Court is found in two 1991 decisions, *Berry v. Commissioner*, 97 T.C. 339 (1991) and *Galuska v. Commissioner*, 98 T.C. 661 (1991), *aff'd.* 5 F.3d 195 (7th Cir. 1993). In both cases, the taxpayer appeared *pro se* before the same Tax Court judge who was deprived of the benefit of professional advocacy. Neither of those opinions discuss any of the issues that are raised by Taxpayer in this litigation. Also, the taxpayers in those cases did not file their returns within three years of the due date. Thus, the application of the two-year limitation period to those taxpayers was dictum, as applied to taxpayers who did file their returns within three years of the due date.

The Tax Court in 1992, for the first time denied a refund to a taxpayer who actually filed a refund claim within three years of the due date. *Allen v. Commissioner*, 99 T.C. 475 (1992), *aff'd*, 23 F.2d 406 (6th Cir. 1994) (unpub.). An explosion of cases followed. (L. 47). In 1994, The Ninth Circuit Court of Appeals, despite a confession of error by the IRS, held that *all* late-filing taxpayers, not just those who have petitioned the Tax Court, are subject to a two-year statute of limitations on claiming refunds. *Miller v. United States*, 38 F.3d 473, 476 (9th Cir. 1994)..

II. A Taxpayer Does Not Have to File an Administrative Claim for Refund to Invoke the Refund Jurisdiction of the Tax Court.

Section 6402 and the regulations thereunder contain the provisions governing the filing and granting of administrative claims for refund. Section 6402 grants authority to the IRS to refund overpayments of tax. Treasury Regulation § 301.6402-2(b) provides, in pertinent part, that a refund of an overpayment may not be allowed unless a claim for refund is (1) filed with the IRS, (2) within the applicable statutory period of limitations, (3) setting forth in detail the grounds and facts upon which the claim is based, and (4) under oath. The United States district courts and the Claims Court have jurisdiction to grant refunds of overpayments of federal income tax. 28 U.S.C. § 1491 (1994); 26 U.S.C. § 7402 (1994). The filing of an administrative claim for refund is a prerequisite to the refund jurisdiction of these courts. I.R.C. § 7422(a); Treas. Reg. § 301.6402-2(a)(1). Revenue Act of 1926, Pub. L. No. 69-20, 44 Stat. 9.

When the Tax Court was created in 1924, it did not have jurisdiction to grant refunds. Congress conferred that jurisdiction upon the Tax Court in 1926 so that all issues involving a taxpayer's liability could be resolved in one proceeding.

There is no statutory provision or Treasury Regulation that requires that an administrative claim for refund be filed with the IRS as a prerequisite to the allowance of a refund to a taxpayer who has filed a petition in the Tax Court in response to a Notice of Deficiency.[5] The requirement that an administrative claim be filed prior to bringing a civil action serves the purpose of ensuring that a taxpayer first exhaust his administrative remedies prior to instituting a suit in a U.S. district court or in the Claims Court. An entirely different procedure was intended for the Tax Court. Many years were expected to elapse between the time that the IRS mails a Notice of Deficiency to a taxpayer and the time in which the Tax Court would issue an opinion. Typically, a Notice of Deficiency is sent to a taxpayer whose return was audited by the IRS and a deficiency asserted. Most taxpayers who are audited and issued a Notice of Deficiency are unaware that they had overpaid their taxes. However, when all of the facts are developed in stipulation conferences and at trial, it may be determined that the taxpayer is actually due a refund. Obviously, a taxpayer who was unaware that he had overpaid his taxes would not have filed a claim for refund.

Although no claim for refund has to be filed by the taxpayer with the IRS as a prerequisite to obtaining a refund in the Tax Court, it is still necessary to subject Tax Court petitioners to a statute of limitations. Section 6512(b)(3)(B), by incorporating § 6511, makes clear that the same statute of limitations that applies in the district court and in the Claims Court applies in the Tax Court. However, since no claim for refund need be filed in order for the Tax Court to order a refund, a reference date for compliance with the statute is

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[5] The IRS incorrectly advised the Fourth Circuit that Section 7422 applied to the Tax Court. "Section 6512(b)(3)(B), in deeming that a taxpayer has filed a claim for refund on the date the deficiency notice was mailed, regardless of whether such a claim was in fact filed *creates the legal fiction that a claim for refund has been filed under section 7422 and authorizes the Tax Court to determine an overpayment in the taxpayer's tax*, provided the overpayment is refundable under Section 6511." IRS Supplemental Brief at 3, *Lundy* (No. 94-1260) (emphasis added).

necessary. Section 6512(b)(3)(B) provides that reference date, it is the date the Notice of Deficiency is mailed.

III. Statutory Framework:

Tax Court Deficiency Jurisdiction. Section 6212 provides that "[i]f the Secretary determines that there is a deficiency in respect of any tax . . . he is authorized to send notice of such deficiency . . . by certified mail or registered mail." Section 6213(a) provides, in relevant part, that "[w]ithin 90 days . . . after the Notice of Deficiency authorized in § 6212 is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." Thus, the Tax Court acquires deficiency jurisdiction when a taxpayer responds to a Notice of Deficiency by filing a petition for redetermination of the deficiency in the Tax Court within 90 days of its issuance.

Tax Court Refund Jurisdiction. Section 6512(b)(1) provides that, once its deficiency jurisdiction is invoked, the Tax Court may find that an overpayment has been made and can order a refund. Thus, if the IRS mails a Notice of Deficiency to a taxpayer, the IRS takes a calculated risk. On occasion, rather than collecting money, the IRS will be ordered to pay a refund.

Limitation on Tax Court Refund Jurisdiction. Section 6512(b)(3)(B) incorporates by reference the limitation of § 6511(b)(2) on the amount of refund that may be recovered, making that provision expressly applicable to taxpayers in the Tax Court.

Statute of Limitations for Claiming Refunds. Section 6511, incorporated by reference into § 6512(b)(3)(B), prescribes the general statute of limitations applicable to claims for refund regardless of the forum in which a taxpayer chooses to present his claim.

IV. By Filing His Return on Which He Claimed an Overpayment Within Three Years of the Due Date, Taxpayer Met the Statute of Limitations Contained in § 6511(b)(2) Incorporated by Reference into § 6512(b)(3)(B).

A. Under § 6511(a), Taxpayers Have Three Years in Which to File a Late Return Claiming an Overpayment in Order to Obtain a Refund.

The IRS initially conceded that under § 6511(a), the general statute of limitations on filing claims for refund, a taxpayer had three years in which to file a return showing an overpayment. The only late-filers that the IRS claimed were subject to a shorter statute of limitations were those taxpayers who received a Notice of Deficiency before they filed their return and then responded by filing a petition in the Tax Court. Appellee's Brief at 28-30, *Lundy* (No. 94-1260). In its Supplemental Brief, however, the IRS referred the Fourth Circuit to *Miller v. United States*, 38 F.3d 473 (9th Cir. 1994), which held that *all* late-filing taxpayers have only two years in which to file their return/claims. As noted above, the IRS conceded error in its brief to the Ninth Circuit, citing its own Revenue Ruling 76-511 which provides for a three-year period in which to file a late return/claim for refund. (L 40-42). Last April it told this Court it was reconsidering this ruling but it has not announced any decision at this time. Respondent's Brief at 9 n.5 *Richards v. Commissioner* (No. 94-1537). In a 1995 brief submitted to the United States District Court for the District of Vermont, the IRS again conceded this issue. (L 45-46).

After giving inconsistent advice to the Fourth and Ninth Circuits, the IRS continues to waffle before this Court. It seems to be asking this Court to choose between *Miller* and its own Revenue Ruling. (Pet. Br. 29-30). The IRS should either retract Revenue Ruling 76-511 and announce to this Court and the taxpaying public that the statute of limitations has been changed or reject *Miller*.

The Ninth Circuit misconstrued the statute in part because it did not understand the circumstances in which the two-year limitation on filing applies. Section 6511(a) contains two separate two-year filing requirements. The two-year rule set forth in the first clause of the first sentence applies to all taxes "in respect of which a taxpayer is required to file a return." Those taxpayers are required to file their claim for refund "within 3 years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later." So, the first two-year limitation only applies where the two-year provision provides a *longer* period than the three-

year provision. This is the only two-year rule discussed in IRS Publication 556, *Examination of Returns, Appeal Rights, and Claims for Refund*. (L 25-26). Example 3 (unnumbered) illustrates this two-year limitation which ordinarily would occur in connection with an audit. Since the first two-year filing requirement in the first clause applies to *any tax imposed in respect of which tax the taxpayer is required to file a return*, the two-year limitation described in the second clause of the first sentence, the one on which the IRS relies, applies only for taxes paid in respect to which a taxpayer is not required to file a return. Publication 556 does not contain an example of the application of the second two-year rule. Since Taxpayer was required to file a return, the second two-year rule does not apply to him.

The IRS quotes language from *Miller* that raises the specter of an unlimited statute of limitations on claiming refunds. (Pet. Br. 30) At first blush, interpreting the filing requirement of § 6511(a) to be satisfied by a return reporting an overpayment filed more than three years late may raise fears of stale claims for refund. *See Oropollo v. United States*, 994 F.2d 25, 30 (1st Cir. 1993); *Miller*, 38 F.3d at 475. Such fears are unfounded. Section 6511(b)(2)(A) contains the real teeth of the limitations provisions and limits the *amount* which can be refunded to the taxes paid within the three years preceding the filing of the claim for refund. So, while it is possible for a taxpayer to file a return/claim many years after the due date and still comply with the filing requirement of § 6511(a), it would not benefit a taxpayer who had overpaid his taxes more than three years before the claim was filed. *Mills v. United States*, 805 F. Supp. 448, 450 (E.D. Tex. 1992); *Domtar v. United States*, 435 F.2d 563, 567 (Ct. Cl. 1970). "[S]ection 6511(b)(2)(A) places a cap on recovery of a refund" which prevents stale claims. *Oropollo*, 994 F.2d at 27.

B. Taxpayer's Return Reporting an Overpayment Filed Within Three Years of Both the Date the Return Was Filed and the Date the Tax Was Paid Satisfied the Statute of Limitations.

1. Taxpayer's Return Also Constituted a Claim for Refund. As His Claim for Refund Was Filed Contemporaneously with His Return, the Claim Was Filed Within Three Years of the Return, and the Statute of Limitations on Filing Contained in § 6511(a) was Satisfied.

Taxpayer complied with the limitation on the time for filing a claim contained in § 6511(a). Treasury Regulation § 301.6511(a)-1 explains the requirements of that provision as follows:

> (1) If a return is filed, a claim for credit or refund of an overpayment must be filed by the taxpayer within 3 years *from the time the return was filed* or within 2 years from the time the tax was paid, whichever of such periods expires the later.
>
> (2) If *no* return is filed, the claim for credit or refund of an overpayment must be filed by the taxpayer within 2 years from the time the tax was paid. (emphasis supplied)

The two requirements in that provision are in the alternative. As Taxpayer did file a return, the alternative which applies to him is clearly the alternative pertaining to a filed return. Taxpayer filed his 1987 tax return in December 1990. That return showing an overpayment also constituted Taxpayer's claim for refund. Treas. Reg. § 301.6402-3(a)(5). Thus, Taxpayer filed his claim for refund contemporaneously with his return and, therefore, within three years of the time the return was filed as required by § 6511(a). Rev. Rul. 76-511, 1976-2 C.B. 428.

2. Because He Complied with the Filing Requirement of § 6511(a), Taxpayer Is Entitled to a Refund of His Overpayment from the Taxes Paid in the Three-Year Period Preceding the Filing of His Return/Claim for Refund.

The limitation on the amount that can be refunded, is contained in § 6511(b)(2). Section 6511(b)(2)(A) limits the amount which can be refunded to the taxes paid within the three-year period preceding the filing of the claim for refund. This three-year limitation applies, by its own terms, if "the claim [for refund] was filed by the taxpayer during the 3-year period described in [§ 6511(a)]." I.R.C. § 6511(b)(2)(A). Section 6511(b)(2)(B) provides that if a claim for refund was not filed within three years of the filing of the return, then the taxpayer can only recover the taxes paid within the two years preceding the filing of the claim.

Taxpayer submits that he has met all of the tests found on the face of the statutes involved and is entitled to a refund of the admitted overpayment for his tax year 1987. Treas. Reg. § 301.6511(b)-1(b). The return comprised both the return and the claim, satisfying the filing requirement of § 6511(a). Treas. Reg. § 301.6402-3(a)(5). His refund cannot exceed that portion of his taxes paid in the three years preceding the filing of the claim. I.R.C. § 6511(b)(2)(A). Taxes collected by means of withholding are deemed paid on April 15 of the year following the taxable year. I.R.C. § 6513(b)(1). The claim was filed on December 28, 1990, well within three years of the overpayment of his tax on April 15, 1988. He is entitled to a refund of his overpayment.

V. Taxpayer is Entitled to a Refund of his Overpayment Because he *Could Have Filed* a Valid Claim for Refund on the date the Notice of Deficiency was Mailed.[6]

A. The Language of § 6512(b)(3)(B) Supports the "Could Have Been Filed" Rather than the "Deemed Claim" Construction of the Statute.

Section 6512(b)(3)(B) limits any refund to the amount applicable under § 6511(b)(2) "if on the date of the mailing of the

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[6] The reference dates for compliance with the statute of limitations are different under Taxpayer's alternative arguments. If the Court determines that his actual return claim for refund is to be given effect for purposes of compliance with the statute of limitations he is entitled to a refund from taxes paid in the three years preceding the date Taxpayer's return claim for refund was filed in December 1990. If the Court determines that the taxpayer is entitled to a refund because he could have filed a valid claim for refund on the date the Notice of Deficiency was mailed, September 26, 1990, he would be entitled to a refund from taxes paid in the three years preceding that date. In this case it would not matter on which theory this Court ruled for Taxpayer. Both possible reference dates are more than two but less than three years from the date the taxes were deemed paid under § 6513, April 15, 1988. However, the theory employed for a decision favorable to Taxpayer, here, would matter to a taxpayer who is mailed a Notice of Deficiency after two but before three years from the date the taxes were paid but who does not file a return/claim within three years of that date. In cases such as *Anderson v. Commissioner*, 36 F.3d 1091 (4th Cir. 1994) and *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir. 1993), the taxpayers would not be entitled to a refund under Taxpayer's first argument, but would be entitled to a refund under Taxpayer's "could have filed" argument.

notice of deficiency a claim had been filed (*whether or not filed*) stating the grounds upon which the Tax Court finds an overpayment." (emphasis added). The parenthetical "whether or not filed" modifies the phrase "if a claim had been filed." Giving these words their ordinary meaning, the most reasonable interpretation is that the parenthetical eliminates any requirement that a claim for refund actually be filed and that a taxpayer is entitled to a refund if he could have filed a claim for refund on that date. This interpretation makes sense because there is no requirement that an administrative claim for refund be filed in order to invoke the refund jurisdiction of the Tax Court. The purpose of the language "if on the date of the notice of deficiency was mailed a claim had been filed" is to provide a reference date for application of the statute of limitations.

The only plausible reason for incorporating § 6511 into § 6512 by reference is to apply the same statute of limitations to taxpayers who petition the Tax Court as that applied to all other taxpayers. If Congress had intended that there be a shorter statute of limitations in the Tax Court it would have drafted a provision expressly applicable to that Court only. This would be particularly true because, under the construction of the IRS, the statute is applied unevenly and capriciously to the class of taxpayers who petition the Tax Court . *See infra* Section IX D.

Taxpayer *could have* filed a timely claim for refund on September 26, 1990, the date the Notice of Deficiency was mailed (which was less than three years from April 15, 1988, the date on which the tax was paid). If Taxpayer had declined to file a petition in the Tax Court, he would have received a refund administratively. I.R.C. § 6511; Rev. Rul. 76-511, 1976-2 C.B. 428. Therefore, he is also entitled to a refund of his overpayment in the Tax Court. The Tax Court itself has often stated this to be the proper construction of the statute. *Estate of Baumgardner v. Commissioner*, 85 T.C. 445, 449 (1985); *Wheeler, Sr. v. Commissioner*, 38 T.C.M. (CCH) 1236, 1238 (1979). Yet, surprisingly, the Tax Court has not addressed the inconsistent result obtained under the line of cases accepting the "could have filed" interpretation (taxpayer obtains refund) and the result in the line of cases accepting the "deemed claim" notion (taxpayer loses refund).

B. The Legislative History Supports the "Could Have Filed" Rather than the "Deemed Claim" Construction of the Statute.

Revenue Act of 1942: In the Revenue Act of 1942, § 169(b), 56 Stat. 798, Congress amended § 322(d), the predecessor of § 6512(b). The legislative history explained the changes and the reasons therefor.

> In order to give the taxpayer the privilege to claim an overpayment before the [Tax Court] by such amendments to his petitions as may be allowed under the rules of the [Tax Court], without the period of limitations running against the refund of such overpayment after the notice of deficiency is mailed, [section 322(d) is amended] to provide that the period of limitations which determines the portion of the tax which may be credited or refunded is measured from the date the notice of deficiency is mailed, rather than from the date the petition is filed.

H.R. Rep. No. 2333, 77th Cong., 2d Sess. 121 (1942).

This Report is illuminating in two regards. It illustrates an assumption by Congress that § 322(d), prior to amendment, did not permit the IRS to shorten the taxpayer's limitation period by the mailing of a notice of deficiency. The taxpayer controlled the tolling of the statute by filing a petition or amended petition containing the grounds for determining an overpayment. It also convincingly evidences a congressional intent that the statute was amended to *improve* the taxpayer's situation. As amended, the mailing of the notice of deficiency, which of course precedes the petition in response, tolls the running of the statute of limitations *against* the taxpayer. Any grounds contained in a subsequently filed amendment to the Tax Court petition will not be time- barred from consideration by the Tax Court. This legislative history clearly indicates that § 322(d), and its successor, § 6512(b)(3)(B) granted to the Tax Court jurisdiction to determine a refund if a timely claim for refund *could have been filed* by the taxpayer on the date the Notice of Deficiency was mailed. The purpose of the 1942 legislation was to aid taxpayers, not to empower the IRS to shorten the statute of limitations by mailing a Notice of Deficiency. This interpretation is

consistent with that of a noted commentator who wrote a definitive history of the Tax Court, including a detailed review of the Tax Court's refund jurisdiction. Harold Dubroff, *The United States Tax Court: An Historical Analysis* 414-27 (1979).[7]

> In 1942 . . . the statute was amended to allow credit or refund if the mailing of the deficiency notice which resulted in the [Tax Court] proceeding was within the statutory period of the overpayment. [Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 877.] Thus, whether or not the original petition claimed an overpayment, *claim therefor would not be time barred if such a claim could validly have been made at the time of mailing of the deficiency notice.* [I.R.C. § 6512(b)]

Id. at 419 (emphasis added).

It is significant that Professor Dubroff cited § 6512(b) of the 1954 Code, obviously not in existence at the time of the 1942 amendments to its predecessor, § 322(d). This reference evidences his correct understanding that Congress intended no substantive change when it enacted § 6512(b)(3)(B) of the 1954 Code and that under both that section and its predecessor, § 322(d), as amended, a late-filing taxpayer who was issued a Notice of Deficiency after two but before three years was entitled to a refund if the Tax Court determined that he had overpaid his taxes. The IRS quarrels with the interpretation of § 322 by the Fourth Circuit and Professor Dubroff. (Pet. Br. 24-25). That section provided in relevant part:

> (d) Overpayment Found By Board [Grant of refund jurisdiction]
>
> No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision (1) that such portion was paid (A) within two years before the filing of the claim, the mailing of the notice of deficiency, or the execution of an agreement by both the

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[7] This text has been cited by the United States Supreme Court and, on numerous occasions, by the Tax Court.

> Commissioner and the taxpayer . . . whichever is earliest, *or* (B) within three years before the filing of the claim, the mailing of the notice of deficiency, or the execution of the agreement, whichever is earliest, *if the claim was filed, the notice of deficiency mailed, or the agreement executed within three years from the time the return was filed by the taxpayer* . . . .

I.R.C. § 322 (1953) (emphasis added).

The word "or" between the two-year limitation of § 322(d)(1)(A) and the three-year limitation of § 322(d)(1)(B) indicates that they were to be applied in the alternative. The highlighted language makes clear that the prerequisites for application of the more favorable three-year limitation period were stated in the alternative. One of the alternatives was that the taxpayer file his claim for refund within three years of the time the return was filed which was accomplished by the filing of a return showing an overpayment. Rev. Rul. 57-354, 1957-2 C.B. 913, superseded in (not relevant) part by Rev. Rul. 66-118, 1966-1 C.B. 290.

Internal Revenue Code of 1954: The House Report that accompanied the legislation which enacted the Internal Revenue Code of 1954 stated that "[t]he 3-year period of limitations for assessment or refund now applying in the case of the income, estate or gift taxes is applied to excise taxes, which presently have a 4-year limitation period." H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4134. The Report also states that § 6511 extends to all taxpayers required to file a return the provisions of existing law and refers to the continuation of the existing 3-year period of limitations for assessment or refund now applying. *Id.* at 4563.

Act of Oct. 23, 1962: In 1962, Congress added clause (C) to subparagraph 6512(b)(3) [then 6512(b)(2)]. Act of Oct. 23, 1962, Pub. L. No. 87-870, 76 Stat. 1158. The Senate Finance Committee explained the new provision:

> Since the 1954 enactment, moreover, the Internal Revenue Service has in practice interpreted the law as permitting the refund of amounts where valid claims have been timely

> filed, as well as where these claims *could have been filed* on the date of the mailing of the notice of deficiency.
>
> Your committee believes it is desirable to amend the language of present law (sec. 6512(b)([3])) to make it clear that the statute conforms with the interpretation of this section followed by the service since the enactment of the 1954 Code.

S. Rep. No. 2273, 87th Cong., 2d Sess. 1962, *reprinted in* 1962 U.S.C.C.A.N. 3987, 4001-02

(emphasis added).

Although the provision enacted, § 6512(b)(3)(C), is not pertinent to the issue here, the Senate Report constitutes irrebuttable evidence of two important points. First, it is evidence of the existence of the administrative practice of the Service to allow claims for refund where a claim could have been filed on the date of the mailing of the Notice of Deficiency and congressional awareness of such practice. Second, it is evidence of the understanding by the Senate Finance Committee that § 6512(b) grants jurisdiction to the Tax Court to determine overpayments and allow refunds *where a valid claim could have been filed* on the date the Notice of Deficiency was issued.

VI. The Contention of the IRS That the "Plain Language" of § 6512(b)(3)(B) Requires Denial of Taxpayer's Refund Does Not Withstand Analysis.

A. The IRS Contention That, under the "Plain Language" of the Statute, Taxpayer's Claim Was Barred by the Statute of Limitations Is Belied by the Conduct and Statements of IRS Employees at All Levels.

The conduct of those responsible for administering the statute in this case was and is inconsistent with what the IRS contends is the plain meaning of the statute. If, in fact, under the plain language of the statute, Taxpayer's refund claim was barred by the statute of limitations the moment he dropped his Tax Court petition in the mail

box, why did IRS employees at all levels proceed as if he was entitled to a refund of any overpayment?

After mailing the Notice of Deficiency to Taxpayer, one IRS official after another treated his claim as having been timely filed. The Appeals Officer acknowledged Taxpayer's petition in the Tax Court as early as March 1991, yet she had the Taxpayer spend months substantiating all of his deductions and credits. She never raised the limitations defense. In fact, she initiated a letter telling him that "the check was in the mail." Moreover, Counsel for the IRS filed an answer without raising a limitations defense. She reported to the trial judge in a conference call with Taxpayer that the case had been resolved and that a refund would be forthcoming. It was not until five days before the call of the calendar that the IRS raised the statute of limitations issue before the Tax Court.

If the language of the statute so plainly dictates a two-year statute of limitations in the Tax Court, why have the Commissioner and other IRS officials communicated to the public, through press releases and interviews, that there exists a three-year period in which to claim a refund? (L 29-39).

If the language of the statute so plainly dictates a two-year statute of limitations in the Tax Court, why do the official IRS publications distributed to taxpayers to assist them in the preparation of their returns and refund claims indicate that the limitation period for claiming refunds is three years? (L 25-28). These publications do not even contain an asterisk or footnote to indicate to taxpayers that the limitation period may be shorter if they file a petition in the Tax Court.

The conduct of IRS employees and all IRS communications to the public, including a revenue ruling, without any reference to the forum of the claim, indicate that the IRS itself interprets the statute as meaning that a taxpayer is entitled to a refund of an overpayment if he files a return within three years of the due date. This represents a correct interpretation of the statute.

B. The IRS Reads into § 6512(b)(3)(B) Three Concepts Which Cannot Be Found in the "Plain Language" of the Statute

The IRS concedes that the Taxpayer overpaid his taxes. The half-hearted defense of *Miller* aside, it is without question that, had the Taxpayer ignored the Notice of Deficiency and filed a complaint in either the Eastern District of Virginia or the Claims Court, the IRS would have issued him his refund. Rev. Rul. 76-511, 1976-2 C.B 428. What the IRS argues is that because the Taxpayer filed a petition in Tax Court a different result must follow.

Throughout this litigation, the IRS has chanted the mantra that, under "the plain language" of the statute, Taxpayer's refund must be denied. The IRS hopes that its "plain language" pronouncement will insulate its argument from scrutiny. However, stating that the "plain language" of the statute supports the denial of Taxpayer's refund does not make it so. In fact, rather than relying on the "plain language" of the statute, the position of the IRS is totally dependent on reading into § 6512(b)(3)(B) three unexpressed and complex concepts. These unexpressed concepts are contrary to the language of the statute, the intent of Congress as evidenced by the legislative history, and the statutory framework.

To succeed in its argument, the IRS must persuade this Court that all of the following concepts are required by the "plain language" of § 6512(b)(3)(B):[8]

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[8] The IRS position is that the mailing of the Notice of Deficiency constitutes a "deemed" or "imputed" claim of the taxpayer and that on the mailing date no return had been filed so Taxpayer could only obtain a refund of taxes paid in the two years prior to the "deemed claim." (Pet. Br. 17). The IRS argument fails if this Court does not find a "deemed claim" in the statute. The IRS fails even if this court accepts the "deemed claim" concept, but considers such claim to be valid and in the form of a return. In that case, the claim would have been filed simultaneously with the return and, hence, within three years of the return. Section 6511(b)(2)(A) would, by its own terms, apply and Taxpayer would be entitled to a refund from taxes paid in the three years preceding September 26, 1990, the date of the "deemed claim." Finally, the IRS fails if this Court agrees with Taxpayer that his actual return/claim for refund, filed within three years of the dates the return was filed and the taxes paid, should be given effect for purposes of compliance with the statute of limitations.

(1) the mailing of a Notice of Deficiency by the IRS constitutes a "deemed claim" for refund filed by a taxpayer;

(2) the Notice of Deficiency constitutes a "deemed claim" for refund even though it is not in the form of a return and does not contain a detailed statement of the grounds on which the refund is based as required by the Treasury Regulations;

(3) the "deemed claim" for refund of a taxpayer cannot be amended or superseded by the taxpayer's actual return/claim for refund, even if filed within the three-year limitation period.

1. The Language of § 6512(b)(3)(B) Does Not Support the "Deemed Claim" Notion of the IRS.

The denial by the IRS of the Taxpayer's claim for refund is totally dependent on the notion that the mailing of the Notice of Deficiency by the IRS constitutes the filing of a "deemed claim" by Taxpayer. The fragment of § 6512(b)(3)(B) which reads "if on the date of the mailing of deficiency a claim had been filed (whether or not filed)" was understood by the trial court as a direction "to assume a claim had been filed--a deemed claim concept." (Pet. App. 39a-40a). The Fourth Circuit correctly concluded that had Congress intended that the date the IRS mailed a Notice of Deficiency was to be deemed the date on which Taxpayer filed his claim, "Congress could have said so explicitly." (Pet. App. 10a). The IRS has repeatedly advised the Tax Court and courts of appeals that the "plain language" of the statute supports the existence of this "deemed claim." Appellee's Brief at 21, *Lundy* (No. 94-1260). The Tax Court and courts of appeals have, without analysis, accepted the IRS interpretation. Now that the Fourth Circuit has rejected the "deemed claim" concept, in part because the words "deemed" and "considered" appear so many times in the Code, but not in § 6512, the IRS has downplayed the significance of the word "deemed" and renamed its Notice of Deficiency as an "imputed claim" of Taxpayer.

However it is expressed, the IRS wants this Court to consider the mailing of the Notice of Deficiency to be deemed, treated or considered as if Taxpayer had filed a claim for refund on the date the Notice of Deficiency was mailed, even though he had not, in fact, done so. When Congress wants something that has not occurred to be treated as if it had in fact occurred, it uses the words "deemed" and the word "considered" interchangeably to achieve that result. The interchangeability of these terms is illustrated by their use in § 6513.[9]

Section 6512 incorporates § 6511 by reference which, in turn, cross-references § 6513, so it is certain that Congress considered all three provisions together. The word "deemed" is used once in § 6511 and four times in § 6513, but not once in § 6512. The word "considered" is used once in § 6511 and seven times in § 6513, but not once in § 6512. The express use of the word "deemed" and "considered" in these two provisions alone would support the Taxpayer's argument against implying either word in § 6512(b)(3)(B) or any other synonym designed to accomplish the same result.

The words "deemed" and "considered" each appear once or multiple times in more than three hundred sections of the Internal Revenue Code, but *not* in § 6512(b)(3)(B). Under these circumstances, it is unreasonable to assume that if Congress intended that the mailing of the Notice of Deficiency be considered a taxpayer's claim for refund but inadvertently failed to use the word "deemed" or "considered." If Congress wished to create such a concept, "deemed" or "considered" would have appeared in the statute.

The IRS now employs a new adjective to describe Taxpayer's non-claim: "imputed." It is late in the game to switch. The IRS

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[9] Section 6513 is entitled "Time Return Deemed Filed and Tax Considered Paid." The operative rule of § 6513(a) states that a return filed before the due date "shall be considered" as filed on the due date and § 6513(b) provides that withholding tax is "deemed to have been paid" by the taxpayer on the due date.

downplays the use of the word "deemed" as semantical.[10] (Pet. Br. 23). Yet, every case on which the IRS relies has based its decision on the existence of a "deemed claim." The more important point, though, is that if Congress intended that the Notice of Deficiency mailed by the IRS to be considered the taxpayer's claim for refund, it would have expressly so stated and it would not matter whether it used the word "deemed," "considered," "treated," or even "imputed" to achieve that result. The fact is that none of those terms can be found in § 6512(b)(3)(B).

This Court has long construed statutes "without resorting to subtle and forced construction for the purpose of either limiting or extending its operation." *United States v. Temple*, 105 U.S. 97, 99 (1881). "When the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision." *Id.* The corollary of that proposition is that if words and phrases must be inserted into a statute to clarify its meaning, as the IRS seeks to do here, its meaning cannot be "plain." The construction sought by the IRS is also in conflict with the principle recently enunciated by this Court that a common sense approach should be employed when construing the Code and that formalistic and strained constructions to limit the waiver of sovereign immunity are disfavored. *United States v. Williams*, 115 S.Ct. 1611, 1618 (1995).

2. Any "Deemed Claim" Should Be Considered to Be in the Form of a Return.

If Congress did intend that a Notice of Deficiency mailed by the IRS be equivalent to a taxpayer's claim for refund, surely it must have been intended that such a claim would be a valid claim. An income tax return showing an overpayment constitutes a claim for refund. Treas. Reg. § 301.6402-3(a)(5). A valid claim for refund must be filed on the appropriate tax form. Treas. Reg. § 301.6402-3(a)(1). The IRS' position is dependent on a finding that the statute

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[10] The semantics are that of the IRS. Whether we refer to the claim as "deemed," "considered," "hypothetical" or "imputed" the IRS is still asking this Court to find that its Notice of Deficiency *mailed to* the taxpayer is the taxpayer's *fictitious* claim for refund.

not only instructs the Court to find a "deemed claim" but a blank claim as well. Any "deemed claim" should be considered to be on a Form 1040 as the Treasury Regulations require.

If a Notice of Deficiency mailed by the IRS is the claim for refund filed by the Taxpayer, what are its terms? If the IRS is going to read into § 6512(b)(3)(B) a concept of a "deemed claim," why not a concept of a "deemed return"? The IRS fails to take into account the language in § 6512(b)(3)(B) following the fragment that provides its basis for the "deemed claim" concept:

> if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) *stating the grounds upon which the Tax Court finds that there is an overpayment* . . . . (emphasis supplied).

The construction of the IRS treats the emphasized phrase as surplusage. The IRS, by ignoring this phrase, violates the rule that a statute should be construed so that all of its words are given effect. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Treasury Regulation § 301.6402-2(b) also requires that a claim for refund contain a detailed statement of the grounds for the claim.[11]

Even if the language of § 6512(b)(3)(B) is assumed to support the existence of a "deemed claim," what "plain language" of the statute requires that the claim be devoid of content and, thereby, invalid under both the statute and the Treasury Regulations? The IRS is pursuing this strained construction in order to confiscate the refunds of unsuspecting taxpayers lured into the Tax Court.[12] This

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[11] A document which contains sufficient detail to compute the taxpayer's liability may constitute a return, even if not submitted on the designated form. Rev. Rul. 74-203, 1974-1 C.B. 330. The "grounds upon which the Tax Court finds that there is an overpayment" would have to be the same information provided on a return.

[12] Taxpayer must reluctantly characterize the collective actions of the IRS as a "trap for the unwary." Taxpayer believes that all the IRS employees with whom he dealt acted in good faith and believed that he was entitled to a refund of the amount finally determined to have been overpaid. Taxpayer also believes that the Commissioner and other IRS personnel who communicated to taxpayers through the

construction, which produces absurd results, characterized by the Fourth Circuit as "pernicious effects", is without any support in the language of the statute. (Pet. App. 10a).

The term "claim" should have the same ordinary meaning in one section as it does in another, *Crane V. Commissioner*, 331 U.S. 1, 12 (1947), particularly where, as here, "the functional relation of the two sections requires that the word mean the same in one section that it does in the other." *Id.* Section 6512(b)(3)(B) incorporates § 6511(b)(2) by reference, which, in turn, refers to claims "filed by the taxpayer." The IRS requires that the "claim" referred to in § 6511 must be submitted on the proper income tax return form. Treas. Reg. § 301.6402-3(a)(1). Any "deemed claim" in section 6512(b)(3)(B) should conform to the same requirement.

The IRS responded weakly to Taxpayer's argument below. It referred to Treasury Regulation § 301.6402-3(a)(5) which provides that an income tax return showing an overpayment constitutes a claim for refund and simply argued that the converse is not necessarily true. Appellee's Brief at 23, *Lundy* (No. 94-1260). The IRS ignored this issue in its opening brief to this Court. Noticeably absent from every brief that it has filed in the Tax Court, the Fourth Circuit and this Court are any references to Treas. Reg. § 301.6402-3(a)(1) which *requires* that if, as here, a claim for refund has not been previously filed, it must be submitted on the appropriate tax return form and Treasury Regulation § 301.6402-2(b) which requires that a claim must contain a detailed statement of grounds. Compliance with these regulations are essential in order to submit a valid claim for refund. These regulations should also be employed to determine the composition of any "deemed claim." To confiscate Taxpayer's refund, the IRS must ignore its own regulations.

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media that they had three years in which to claim refunds also acted in good faith. Taxpayer also believes that those responsible for the content of IRS publications and the drafting of the Notice of Deficiency were unaware of the litigation posture of the IRS and, for that reason, failed to include a warning that the statute of limitations could be shorter for Tax Court petitioners. Just the same, the combination of their actions and communications and the actions of Chief Counsel effectively amount to a trap for taxpayers who have overpaid their taxes and unwittingly elect to file a petition in the Tax Court.

Therefore, this Court should conclude that any "deemed cl:. for refund filed by the Taxpayer was embodied in a retu:n i.. would therefore have also been deemed to have filed his claim for refund simultaneously with that return and would be entitled under § 6511(b)(2)(A) to a refund of all taxes paid in the three years preceding the filing of the claim. Since the Notice of Deficiency/"deemed claim" was deemed filed on September 26, 1990, less than three years from April 15, 1988, the date the taxes were paid, Taxpayer is entitled to a refund of his overpayment.

3. The Actual Return Filed by the Taxpayer Should Supersede or Amend Any "Deemed Claim."

The several references to filing "by the taxpayer" in § 6511 grant the right to file a claim for refund to the taxpayer. This right should not be unilaterally abrogated by the Commissioner's mailing of a Notice of Deficiency/ "deemed claim for refund."

Under the third prong of its tortured construction of § 6512(b)(3)(B), the IRS disregards the actual claim /return filed "by the taxpayer." The IRS concedes that it treated Taxpayer's return as valid for purposes of determining his "correct liability and the existence of an overpayment." (Pet. Br. 17 n.6). Undoubtedly, if a deficiency had been determined to exist, instead of an overpayment, the IRS would have treated the return as valid for that purpose, as well. However, Taxpayer's return was treated as a nullity for purposes of compliance with the statute of limitations. *Id.*

In an analogous situation, the Tax Court, in a reviewed decision, held that taxpayers' actual return claiming joint return status (with a lower tax liability) superseded a substitute return prepared by the IRS electing married, filing separate status. *Millsap v. Commissioner*, 91 T.C. 926, 938 (1988). The Tax Court rejected the IRS' position that the preparation of the substitute returns pursuant to § 6020 precluded the taxpayers from electing joint filing status for purposes of § 6013. Although the IRS had authority to prepare the substitute returns, the taxpayers retained all of their rights to contest the deficiency, as well as the elements, including filing status, which comprise it. "Where several statutory provisions conflict in their application, we should attempt to interpret or reconcile them in a manner which will not

cause an arbitrary or an unreasonable result." *Millsap*, 91 T.C. at 937 (citing *Porter v. Commissioner*, 288 U.S. 436 (1933)). Where there are apparently conflicting provisions, the Court should attempt to "give effect to each if we can do so while preserving their sense and purpose." *Id.* (citing *Haggar v. Helvering*, 308 U.S. 389 (1940)); *see also Menasche*, 348 U.S. at 538-39 (The Code should be construed so as to give effect to all the words of the related provisions.).

In *Haggar*, the statute permitted the taxpayer to state the base for a capital stock tax. Once the base value was declared "in its first return under this section" it could not be amended in later years. The taxpayer mistakenly understated the value on a return filed before the due date but filed an amended return with a corrected valuation, also before the due date. The IRS rejected the amended return because it was not the "first return." The Supreme Court observed that the purpose of the statute was to allow the taxpayer to fix for itself the amount of the capital stock base during the first year. The Court rejected the IRS position:

> To construe "first return" as meaning the first paper filed as a return, as distinguished from the paper containing a timely amendment, which, when filed . . . is to defeat the purposes of the statue by dissociating the phrase from its context and from the legislative purpose in violation of the most elementary principles of statutory construction.

Haggar v. Helvering, 308 U.S. 389, 396 (1940).

The rationale of *Haggar* and *Millsap* is applicable in this case. Taxpayer's actual return\claim for refund should be given effect for purposes of compliance with the statute of limitations in order to give effect to all the relevant statutory language. Interpreting § 6512(b)(3)(B) to allow Taxpayer's actual return to supersede any "deemed" or "imputed" claim would provide a rational meaning for the words "claim for refund . . . shall be filed by the taxpayer" in § 6511. Just as the taxpayer in *Haggar* was entitled to exercise his right to amend his declaration of value before the due date and just as the taxpayers in *Millsap* were allowed to file a joint return which superseded the substitute returns prepared by the IRS, so should Taxpayer be allowed to file a return/claim within three years of the due date which is given effect for purposes of section 6511.

IRS justification for abrogating the rights to which the Taxpayer would otherwise be entitled is even more tenuous here than in *Millsap*. In *Millsap*, the IRS had express statutory authority for preparing the substitute return, whereas here the IRS must rely on an imputed "deemed claim." The Tax Court's failure to give effect to Taxpayer's return/claim for refund filed in December 1990 is inconsistent with its rationale in *Millsap*. The *Millsap* rationale should prevail.

Alternatively, Taxpayer submits that his actual return/claim should be accepted as an amendment to any "deemed claim" under the principles of *Bemis Bros. Bag. Co. v. United States*, 289 U.S. 28 (1933), recently followed in *Mutual Assurance, Inc. v. United States*, 56 F.3d 1353 (11th Cir. 1995). Mutual had filed its claim for refund which was granted. Subsequently, the IRS discovered during a field examination that a miscalculation had caused Mutual to understate its refund claim. A second refund claim filed by the taxpayer was denied by the IRS on the ground that the three-year period for filing claims for refund had expired. According to the IRS the first payment extinguished the original claim, so that no claim existed that could be amended. The Eleventh Circuit concluded that the claim for refund contained a defective prayer for relief, which could be amended. That rationale applies in this case. Any "deemed claim" for refund must state the grounds upon which the Tax Court determines that an overpayment has been made. I.R.C. § 6512(b)(3)(B). The Taxpayer's executed return should be allowed as an amendment to the "deemed claim." Taxpayer's "deemed return/claim" was filed on September 26, 1990, well within three years of the date he paid his taxes, April 15, 1988. He is entitled to a refund of his overpayment.

In sum, the IRS' obligation when it receives a claim for refund, even a "deemed claim" for refund, is to objectively consider factors which reduce, as well as increase, a taxpayer's liability. In the words of the Supreme Court, "[if the IRS determines that its] assessment is erroneous . . . [j]ustice will then require that it be changed to that extent." *Bemis Bros. Bag.*, 289 U.S. at 35.

VII. The IRS Engaged in a Longstanding Administrative Practice of Granting Refunds to Taxpayers Who Filed Their Return/Claim for Refund Within Three Years of the Due Date and this Administrative Practice Has Been Incorporated into the Code under the Legislative Reenactment Rule.

The Fourth Circuit correctly surmised that the IRS changed its administrative practice sometime around 1991. (Pet. App. 21a). It may be more accurate to state that, while the IRS' practice at the field level has remained the same, its litigation posture has changed. The IRS practice is evidenced in a number of ways: All IRS employees with whom Taxpayer dealt acted on the assumption that he was entitled to a refund of any overpayment. IRS communications to the public through the media state that taxpayers have three years in which to file their refund claims (L 29-39). No special rule is set forth for the Tax Court. IRS publications distributed to taxpayers to assist them in the preparation of their returns and appeals also indicate a three-year period in which to claim a refund. (L 25-28). The Notice of Deficiency does not warn taxpayers that they may be subject to a shorter statute of limitations and may forfeit their refunds if they accept the invitation contained in that Notice by filing a Tax Court petition. (L 1).

It is also telling that the IRS has not set forth its three-pronged "deemed claim" interpretation of § 6512(b)(3)(B) in a Treasury Regulation. Treasury Regulations are employed to flesh out the bones of the statute. *Estate of Sherrod v. Commissioner*, 774 F.2d 1057, 1064 n.9 (11th Cir. 1985); *J.H. Rutter Rex Mfg. Co. v. Commissioner*, 853 F.2d 1275, 1286 (5th Cir. 1988). The IRS' complex extrapolation from the statute urged upon this Court would seem to be a particularly appropriate subject of an explanatory regulation. The need for a regulation is all the more compelling because the consequences to individual taxpayers are so drastic.

The statute of limitations for claiming refunds in the Tax Court has been substantially unchanged since 1942. The first time the Tax Court denied a refund to a taxpayer who actually filed a return showing an overpayment within three years of the due date was in 1992. A flood of cases followed. (L 47). The only plausible explanation for this litigation history is a change in IRS administrative practice or IRS litigation posture.

The practicing tax bar accepts without question that a taxpayer is entitled to a refund if he could have filed a valid claim for refund on the date the Notice of Deficiency is mailed. This interpretation is taught to practitioners by ALI ABA as part of its continuing legal education function.

> The overpayment jurisdiction of the Tax Court, which exists only when the deficiency jurisdiction of the court has already been properly invoked, permits the court to turn the tables on the government and, instead of finding that the taxpayer has underreported his tax (that is, that there is a deficiency), conclude that he has overpaid instead. Although a properly filed refund claim is not a jurisdictional prerequisite to a Tax Court overpayment determination, the overpayment jurisdiction of the court is carefully drawn to avoid expanding the powers of the court beyond the Commissioner's underlying power to issue a refund. *Thus, on the date that the notice of deficiency was issued, the taxpayer must have been in a position either to file a timely claim for refund or to file a timely refund suit on a timely filed claim in order to permit the Tax Court later to declare an overpayment of the amount in question.* [§ 6512(b) and cross-referenced subsections in § 6511(b)] (emphasis supplied).

Taylor et. al., *Tax Court Practice* 16 (8th Ed. 1993).

The IRS has had numerous opportunities throughout this litigation, including its brief to this Court, to confront these facts but it has made no attempt to do so. Facts do not cease to exist because they are ignored. Aldous Huxley, *A Note on Dogma*. The only "facts" offered by the IRS to show that such a practice did not exist are quotations from Tax Court opinions describing the IRS litigation posture. (Pet. Br. 27-28). The response of the IRS to the facts suggesting the existence of an administrative practice is that it is a "figment of [Taxpayer's] imagination." Appellee's Brief at 30 n.12, *Lundy* (No. 94-1260).

The longstanding administrative practice of the IRS to grant refunds to taxpayers who file their return/claim for refund within three years of the due date has survived several reenactments of the

Code. It has thus been incorporated into the statute under the legislative reenactment rule. *Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 283 (1966).

VIII. The Construction of § 6512(b)(3)(B) Urged by the IRS Conflicts with Other Code Provisions Which Are Part of the Statutory Framework.

The IRS asks this Court to focus on a short fragment of a clause of a statute which is part of what the Tax Court refers to as an "intricate" statutory framework but it also asks that this fragment be viewed in isolation and that the statutory framework be ignored.

Legislation is not enacted clause by clause, sentence by sentence, or even section by section. A court's interpretation of a single provision necessitates consideration of all related provisions. *See Commissioner v. Tufts*, 461 U.S. 300 (1983). In rejecting an interpretation of one section that would be in conflict with another, the Court stated that "[s]uch a result would be to construe 'one section of the Act . . . so as . . . to defeat the intention of another or to frustrate the Act as a whole.'" *Id.* The construction of the IRS conflicts with the purpose of several other Code provisions within the statutory framework and is inconsistent with the mandate of *Tufts*.

Section 6511. As noted in the earlier discussion of *Haggar* and *Millsap*, the construction placed on section 6512(b)(3)(B) by the IRS would deprive taxpayers of the right afforded to them by section 6511 to file their own claims for refunds.

Section 6512(a). In 1934, Congress gave the Tax Court jurisdiction to determine whether a taxpayer had complied with the statute of limitations and explained that the purpose of the legislation was to permit issues regarding a taxpayer's liability to be determined in a single forum. *Barton v. Commissioner*, 97 T.C. 548, 554 (1991); H.R. Rep. No. 704, 73rd Cong., 2d Sess. 38 (1934).

In *Estate of Baumgardner v. Commissioner*, 85 T.C. 445 (1985), a Notice of Deficiency asserted a substantial additional tax liability. Instead, an overpayment was found to exist by the Tax Court. During the course of litigation, the parties agreed on the amount of

the tax that was overpaid and the issue was whether [illegible] § 6512 included the overpaid tax only or also included [illegible] due the taxpayer as a result of the overpayment. The Tax Court stressed the necessity of construing its refund jurisdiction broadly in light of section 6512(a)'s prohibition against suits in the district courts or Claims Court by taxpayers who had previously filed a Tax Court petition. This indicated "a clear statutory intent that, in appropriate circumstances, the Tax Court should be able to determine an overpayment to the exclusion of other Tax forums. This intent would be frustrated by a reading of section 6512(b) that limits the Tax Court's jurisdiction to determining an 'overpayment' which varied from 'overpayments' that the excluded forums could have found." *Estate of Baumgardner*, 85 T.C. at 450-51.

In *Barton v. Commissioner*, 97 T.C. 548, 554 (1991), the Tax Court also recognized that the 1934 legislation required it to construe its refund jurisdiction broadly so as to avoid bifurcation of litigation. The court flatly stated that once the Tax Court obtained jurisdiction to determine a deficiency it also acquired jurisdiction to determine an overpayment. 97 T.C. at 551-52.

The Tax Court's narrow construction of its refund jurisdiction in this case is inconsistent with these two well-reasoned reviewed decisions. The rationale of *Baumgardner* and *Barton* is compelling and should be applied here. Sections 6511 and 6512 should be construed so that the refund jurisdiction of the Tax Court and the other refund forums is concurrent.

Section 6501. The legislative history clearly indicates that Congress intended that there be symmetry between the time in which the IRS can assess a deficiency under § 6501 and the time in which taxpayers can claim refunds under § 6511. Congress has never indicated that there be a different rule applicable to taxpayers who elect to file a petition in the Tax Court.

As early as 1918, Congress indicated that symmetry was intended. S. Rep. No. 617, 65th Cong., 3d Sess. 10 (1918). In 1934, Congress lengthened both the statue of limitations on assessments and refund claims from two to three years. Revenue Act of 1934, Pub. L. No. 73-216, 48 Stat. 680. The Senate Report indicated that the two limitation periods should be correlative. S. Rep. No. 558,

73d Cong., 2d Sess. 44 (1934). The 1954 legislative history, discussed above in Section V. B. of this brief also evidences congressional intent that there be symmetry between the statute of limitations on assessments and refund claims.

Section 6511(a) of the 1954 Code, as originally enacted, contained an unintended change. It provided that a claim for refund must be filed within three years of the due date, rather than three years from the date the return was filed, as under prior law. The statute was silent as to the effect of extensions. The Service ruled that a claim filed more than three years from the due date would be barred by the statute of limitations.[13] The change in statutory language which supported the Service's ruling was inadvertent and § 6511(a) was amended by the Technical Amendments Act of 1958, Pub. L. No. 85-866, § 82(a), 1958 U.S.C.C.A.N. (72 Stat. 1606) 1925. With regard to § 6511(a), the Senate Report stated:

> *(a) Period for filing claim.* Under present law a claim, to be valid, must in general be filed within 3 years from the due date of the return, without regard to any period of extension granted for the filing of the return (or within 2 years from the time of tax payment, whichever is later). However, the rule with respect to assessments is that the period of limitation is 3 years from the date the return was actually filed, whether or not filed when it was due. To correlate these rules the House bill (by amending sec. 6511(a)) provides that a claim for refund or credit of any tax may be filed within 3 years from the time the return was actually filed (or, as under present law, within 2 years from the time of payment, whichever is later). Your committee has accepted this change.

[13] Rev. Rul. 57-354, 1957-2 C.B. 913, superseded in part (after 1988 amendment to § 6511(a)) by Rev. Rul 66-118 contains another statement of interest. It concludes with the notation that, irrespective of the filing requirement of section 322(b)(1) of the 1939 Code and § 6511(a) of the 1954 Code, § 6511(b), and its predecessor, § 322(b)(2), limit the *amount* of any overpayment of tax which may be refunded even though the claim is timely filed under section 6511(a). This would appear to indicate that the IRS views § 6511(b), rather than § 6511(a), as the provision which ultimately protects the government against stale claims for refund.

> *(b) Limit on credit or refund.* Present law as one alternative provides that the amount of any credit or refund allowed cannot exceed the portion of the tax paid within a period of 3 years immediately preceding the filing of the claim. To correspond with the amendment described above, the House bill provides that in such cases the amount to be refunded or credited is not to exceed that portion of the tax which was paid within a period of 3 years preceding the filing of the claim plus the period of any extension of time for filing the return. Your committee has accepted this change.

S. Rep. No. 1983, 85th Cong. 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 4791, 4887.

Taxpayer respectfully submits that the legislative history unequivocally supports the conclusion that Congress intended that taxpayers have three years to file a return/claim for refund and that no different rule was intended to apply in the Tax Court. The committee reports evidence a consistent and continuing congressional intent that the rights of the Commissioner and taxpayers to reopen taxable years be correlative. It is logical to conclude that if Congress had perceived any other inconsistencies between limitations on assessments and refunds it would have eliminated such unfair advantage. The Tax Court's finding that the Service can shorten the time in which a taxpayer must file a claim for refund from three to two years is clearly at loggerheads with this expression of congressional intent.

IX. There Are Sound Policy Reasons for Affirming the Fourth Circuit.

The statutory language does not explicitly support the construction placed on it by the IRS. There are sound policy reasons for rejecting that construction.

A. Taxpayers Should Be Subject to the Same Statute of Limitation in the Tax Court as in the Other Refund Forums.

This Court has stated that "a desire for equality among taxpayers is to be attributed to Congress, rather than the reverse." *Colgate-*

Palmolive Peet Co. v. United States, 320 U.S. 422, 425 (1943). It is difficult to quarrel with this principle. The fundamentally disparate treatment meted out to Taxpayer, while within the power of Congress to dictate, should not be assumed. The loss of Taxpayer's refund, an unjust and harsh result suffered only because of the fortuity that he was mailed a Notice of Deficiency before he filed his return and only because he naively elected to respond to the invitation contained in that Notice to file a petition in the Tax Court, should only be countenanced upon a clear and *explicit* command in the statute.

The volume of precedent supporting the position of the IRS is misleading. As noted earlier, the precedent for the recent spate of Tax Court cases is found in two cases, *Berry v. Commissioner*, 97 T.C. 339 (1991) and *Galuska v. Commissioner*, 98 T.C. 661 (1992). Once *Galuska* and *Berry* were decided, the die was cast in the Tax Court. However, all of the Tax Court cases suffer from the same flaw that negates their value as precedent. The denial of a refund of taxpayer's overpayment in each was totally dependent on the acceptance, without analysis, of the "deemed claim" concept. The courts of appeals decisions, affirming the Tax Court, also erred, in large part because they were misled by the IRS.

The very attorneys who wrote the brief for the IRS in the Fourth Circuit told the Seventh Circuit that a decision for the IRS in *Galuska* would have no adverse affect on taxpayers such as Mr. Lundy, who filed their return within three years.

> Section 6512(b)(3)(B) provides, in effect, however, that no portion of any such overpayment determined by the Tax Court shall be refunded to the taxpayer to the extent the taxpayer would have been precluded under Section 6511(b)(2) from obtaining a refund had he filed suit in the District Court. Section 6512(b)(3)(B) thus seeks to place taxpayers who seek a refund of an overpayment in the Tax Court in the same position as if they had brought a refund suit in the district court.

Appellee's Brief at 5, *Galuska. v. Commissioner*, 5 F.3d 195 (7th Cir. 1993) (No. 92-3591). (L 43-44).

The Seventh Circuit obviously agreed with the IRS:

> In view of section 6512(b)(3), a taxpayer who asks the Tax Court for a refund of an overpayment is treated the same as if he had brought a refund suit in the district court, so that there is no advantage in choosing one forum over the other.

Galuska, 5 F.3d. at 196 n.1.

The Seventh Circuit, however, also accepted the IRS' contention that the mailing of the Notice of Deficiency constituted Galuska's "deemed claim" with the result that the two-year limitation period of § 6512(b)(2)(B) applied. *Id.* at 196. The Seventh Circuit was clearly unaware that it was being induced to write an opinion that would be subsequently cited as authority for the disparate treatment of Taxpayer sought here by the IRS.

Taxpayer in this case did file his return within three years and could have obtained a refund in the district court. If the IRS is held to its admission in its *Galuska* brief, Taxpayer should receive his refund.

In *Richards v. Commissioner*, 37 F.3d 587, 591 (10th Cir. 1994), the Tenth Circuit approved that part of the *Galuska* opinion that called for consistent treatment of taxpayers, regardless of forum. Yet, it also accepted, without analysis, the "deemed claim" notion and concluded that the two-year limitation period applied. While it did not matter which limitation period applied in *Galuska*, it very much mattered in *Richards*. Taxpayer's refund was forfeited. The Tenth Circuit confused questions of law and fact:

> We call attention to these portions of the Galuska opinion to emphasize what we perceive to be the fact-intensive nature of this analysis. While Mr. Galuska would not have gained an advantage in choosing federal district court as opposed to [T]ax [C]ourt, Ms. Richards case intimates a different conclusion. If Ms. Richards' claim had been brought in federal district court, we would have agreed with her position that the three-year refund period

> applied under [section] 6511(b)(2)(A) and the taxes she overpaid would have been refundable.
>
> Thus, while the facts of *Galuska* suggest "no advantage" to choosing a particular forum to litigate this issue, the facts of Ms. Richards' case suggest a contrary result.

Richards, 37 F.3d at 591.

The law does not change with the facts. The law is applied to the facts. If, as the IRS represented to the Seventh Circuit, § 6512(b)(3) seeks to place the taxpayer who petitions the Tax Court in the same position that he would be in had he filed a complaint in district court, the taxpayer in *Richards* should have received her refund.[14]

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[14] The Ninth Circuit's erroneous application of a two-year statute of limitations to all taxpayers in *Miller v. United States*, 38 F.3d 473 (9th Cir. 1994), is partly attributable to misplaced reliance on the decisions involving the statute of limitations applicable to Tax Court petitioners. The Ninth Circuit relied on the following language from *Galuska*, 5 F.3d at 196 n.1:

> In view of section 6512(b)(3), a taxpayer who asks the Tax Court for a refund of an overpayment is treated the same as if he had brought a refund suit in the district court, so that there is no advantage in choosing one forum over the other.

The clear thrust of the Seventh Circuit's statement is that a taxpayer who elects to litigate his liability in the Tax Court should receive no worse treatment in the Tax Court than he would in a district court. The Ninth Circuit, however, looked only at the last phrase of the quoted language. It reasoned that since there should be no advantage in choosing one forum over the other and since taxpayers in the Tax Court only have a two-year period in which to claim refunds, the rule should be the same in the district court. The Ninth Circuit obviously was unaware that, even under the IRS position, if a taxpayer filed his return more than two years late but before the issuance of the notice of deficiency "deemed claim" for refund he would have the benefit of the three-year limitation period. The Ninth Circuit was also apparently unaware that the Tax Court and the Tenth Circuit in *Richards v. Commissioner*, 37 F.3d 587, 591 (10th Cir. 1994), have acknowledged that their interpretation of section 6512(b)(3)(B) results in section 6511, the general statute of limitations, being applied *differently and more harshly* to taxpayers who elect to file a petition in the Tax Court than it is applied to taxpayers who file a refund suit

Taxpayer agrees with the IRS that there are some differences between tax litigation in the Tax Court and the district courts. (Pet. Br. 32). The fact is, that by incorporating § 6511 by reference into § 6512(b)(3)(B), Congress indicated that it wanted the *same* statute of limitations to apply in the Tax Court that applies in the other forums. An extreme punishment should not result from implying three unexpressed concepts into § 6512(b)(3)(B). As the Fourth Circuit observed: "[I]f there is such a rational reason [for different statutes of limitations], Congress certainly hasn't articulated it." (Pet. App. 17a). The IRS cites the highly respected treatise, Junghans & Becker, *Federal Tax Litigation* (2d ed. 1992) as authority for one of the differences between Tax Court and district court litigation. (Pet. Br. 32 n.13). The coverage in that treatise of the statute of limitations for claiming refunds is worthy of note: the Tax Court has refund jurisdiction "if the taxpayer could have timely filed a claim for refund on the mailing date of the notice of deficiency even though no claim was actually filed." *Junghans & Becker* at 4-25 (citing § 6512(b)(3)(B)).

B. The Harsh Result Sanctioned by the Tax Court Will Fall Mainly on Unsophisticated Taxpayers, Rather than More Affluent Taxpayers Who Can Afford to Retain Counsel and File a Refund Suit in a District Court or the Claims Court.

That Taxpayer would suffer the loss of his refund only if he elects to contest his tax liability in the Tax Court, as opposed to the other forums having refund jurisdiction, is all the more absurd if the reason for the establishment of the Tax Court is considered. The stated reason for its establishment was to "remove the hardship occasioned by an incorrect assessment" by allowing taxpayers to contest their tax liability without first paying the tax. S. Rep. No. 398, 68th Cong., 1st Sess 8 (1924). "[The taxpayer] is entitled to an

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in the district court. In other words, the Ninth Circuit was confused, but understandably so. It misunderstood decisions of sister circuits which were themselves in error and the net result, at least in the view of the Ninth Circuit, is a general two-year statute of limitations for filing claims for refunds in clear contravention of section 6511's grant of three years. In effect, the IRS, now apparently relying on *Miller*, is seeking to bootstrap the statute's three-year statute of limitations into a two-year statute of limitations for *all* late-filers.

appeal and to a determination of his liability for the tax prior to its payment." *Id.* We would have to ascribe perversity to Congress to believe that it established the Tax Court to facilitate taxpayers' ability to contest their tax liability and, at the same time, created a statutory scheme where a substantial number of those taxpayers expecting to benefit from Tax Court jurisdiction would have those expectations crushed. The Tax Court has also recognized that the element of fairness should be a significant factor in construing the scope of its refund jurisdiction. "Congress did not intend by section 6512(b) and its predecessors to expand this Court's jurisdiction to overpayments and, at the same time, create a situation where choice of this forum would provide such unfair results." *Estate of Baumgardner v. Commissioner*, 85 T.C. 445, 453 (1985).

The 1924 Senate Report also noted that the Tax Court was to "sit locally throughout the United States to enable taxpayers to argue their cases with as little inconvenience and expense as is practicable" and provided for a "flexible and informal procedure." S. Rep. No. 398, at 9. Many of the taxpayers whose wages are overwithheld and have overpaid their taxes either cannot afford counsel or the amount involved, as here, does not justify the expenditure. The IRS recognizes that the Tax Court is the only one of the three forums where a taxpayer can effectively appear pro se. In IRS Publication 5, *Appeal Right and Preparation of Protests for Unagreed Cases*, (L 28), the following statement appears:

> The [Tax] Court will schedule your case for trial at a location convenient to you. You may represent yourself before the Tax Court, or you may be represented by anyone permitted to practice before that Court.

There is no reference to self-representation in the section of Publication 556 that discusses appeals to the district courts and the Claims Court.

C. Taxpayers Would Be Forced to Pay the Assessed "Deficiency," Retain Counsel, and File Refund Suits in District Court or Forfeit Their Refunds.

Despite the fact that the IRS continues to communicate to the public that they have three years in which to file their refund claims,

eventually the truth will come out. Late-filing taxpayers with refunds due will be educated to shun the Tax Court. If they can afford to pay the box-car "deficiencies,"[15] which can be computed without credit for any taxes paid through withholding or deductions to which the taxpayer is entitled, they will flock to the district courts. Most will be forced to appear *pro se*, a task they are not equipped to perform, in courts not geared to serve them. Congress surely did not contemplate this scenario when it created the Tax Court and gave it refund jurisdiction.

D. The Code Should Not Be Construed in a Manner Which Results in an Arbitrary and Capricious Application of the Statute of Limitations.

Under the IRS construction of § 6512(b)(3)(B), the statute of limitations applies unevenly and capriciously to Tax Court petitioners.

The IRS chides those individuals, such as Taxpayer, who file their returns after two but before three years, (Pet. Br. 33), implying that their culpability justifies forfeiture of their refund. But if the IRS computer generates a Notice of Deficiency before the expiration of two years, the IRS admits that the taxpayer will receive his refund no matter how many years late the taxpayer files, or even if no return is *ever* filed. (Pet. Br. 33 n.15.) Another absurdity which results under the IRS construction is that the "deemed claim" only arises if the Notice of Deficiency is mailed before the return is filed. *Id.* As the Fourth Circuit stated: "There is no rational reason why the taxpayer should have a three-year refund period cut short simply because the IRS beat the taxpayer to the punch by mailing the Notice of Deficiency first. Congress certainly did not intend the length of

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[15] As the Fourth Circuit observed, in many cases it would be difficult for the taxpayer to pay the deficiency, and to force him to do so would be inconsistent with the purpose for the creation of the Tax Court to allow "the average taxpayer [to] challenge a notice of deficiency without first having to pay the deficient amount." (Pet. App. 10a n.7). The court observed that to obtain his refund [of $3,537], Taxpayer would have had to pay almost $14,000. (Pet.App. 10a n.7). Of course, this does not take into account the additional cost of retaining counsel in order to proceed effectively in the district court.

the refund period to turn on such an arbitrary distinction." (Pet. App. 18a-19a).

The anomalies generated by the IRS construction can be illustrated: Assume that taxpayers A and B have each overpaid their taxes and neither has filed a return for 1990. The due date of their returns and the date their taxes are deemed paid is April 15, 1991. If, as a result of fortuity, an IRS computer generates a Notice of Deficiency to A on April 13, 1993 and to B on April 17, 1993, A gets his refund but B does not. A's "deemed claim" will have complied with the 2-year limitation of § 6511(b)(2)(B) but B's "deemed claim" would not. The divergent treatment afforded to A and B cannot be justified rationally. Moreover, it creates an incentive for the IRS to lay in the weeds and issue Notices of Deficiency to non-filers immediately after the expiration of two years and hope that those taxpayers file a petition in the Tax Court. In this regard, the Fourth Circuit criticized a situation where the taxpayer suffers because the IRS delays the mailing of the Notice of Deficiency. (Pet. App. 17a-19a). If the goal of the IRS is to make sure that none of the non-filers get refunds, there is a simple solution: wait three years and one day from the date the taxes were paid to mail the Notice of Deficiency. If a taxpayer has still not filed a return by that date he would not be entitled to a refund under any theory.

Assume the same facts, described above, except that A files his return reporting an overpayment on July 1, 1993, Notices of Deficiency are mailed to each on July 15, 1993, and B files his return reporting an overpayment on July 30, 1993. Since A filed his return before the Notice was issued, the three-year limitation period of § 6511(b)(2)(A) applies, and he obtains his refund. As to B, since no return was filed prior to the "deemed claim" for refund, the 2-year limitation would apply and his refund would be confiscated.

The effect of the IRS position is that with respect to a taxpayer who has not as yet filed a return there are 365 possible statutes of limitations (the date the Notice of Deficiency is mailed). For example, a Persian Gulf veteran was subject to an effective statute of limitations of 2 years, 10 months, 30 days, *Hathaway v. Commissioner*, 66 T.C.M. (CCH) 1101 (1993), while another taxpayer was subject to an effective statute of limitations of 2 years,

13 days, *Sumiel v. Commissioner*, 65 T.C.M. (CCH) 2142 (199
(L 47).

Congress could not possibly have intended such ridiculous disparities when it enacted § 6512(b)(3)(B) and the statute should not be so construed. Under the IRS' construction, the application of the limitation period has no consistent relationship to the conduct or culpability of the taxpayer.

The IRS stated to the Fourth Circuit that this fickle application of the tax laws is beside the point and could be avoided by filing a return within two years of the due date. Appellee's Brief at 28-29, *Lundy* (No. 94-1260). This totally capricious and/or arbitrary application of the statute is not "beside the point." A statute should be not be construed in such a manner so as to produce absurd results. *Haggar v. Helvering*, 308 U.S. 389, 394 (1940). The IRS statement that the three-year statute of limitations can only be preserved by filing a claim for refund within two years speaks for itself.

X. There Is No Policy Support for the Construction of the Statute Offered by the IRS.

The construction of the IRS serves "...no administrative or governmental convenience or purpose apart from compliance with the supposed command of the statute." *Haggar Co. v. Helvering*, 308 U.S. 398. What "governmental convenience" results from having 365 statutes of limitation in the Tax Court? Were the IRS to have the misfortune of winning this case, it would have to change its revenue rulings, change publications addressed to taxpayers, reprogram its computers that generate checks on claims for refund, and conduct a publicity campaign to reverse the understanding by the financial press that taxpayers have three years. The refunds confiscated from unsuspecting taxpayers would be offset by the expense of changing and publicizing its refund procedures.

Every time the IRS has offered a policy reason in support of its position, it opens its position to ridicule. In the proceedings below, the IRS made representations which could have but did not mislead the Fourth Circuit: (1) The IRS incorrectly stated that "[i]f Section 6512(b)(3)(B) did not deem that a claim for refund had been filed, then any refund would be barred [by § 7422] to a taxpayer, such as

taxpayer herein, who, in fact, has not filed a claim for refund." (IRS Supp. Br. 2) This is nonsense. (2) The IRS advanced *Miller* to support the proposition that there was no unfairness to taxpayers who petition the Tax Court because the rule in the district courts was two years. The IRS did not inform the Fourth Circuit that it had confessed error to the Ninth Circuit. (3) The IRS employed *Galuska* as authority for the two-year statute of limitations but did not reveal that its brief to the Seventh Circuit represented that § 6512(b)(3)(B) simply put a Tax Court petitioner in the same shoes as a taxpayer in the district court.

Equally ludicrous is its statement to this Court: "It should not be forgotten that the solution to respondent's predicament was within his own grasp." (Pet. Br. 33). Had the IRS not lulled Taxpayer into a false sense of security by issuing refunds to him in past years when he filed more than two years late; had the IRS not withheld from Taxpayer the change in its litigating posture when he wrote them and told them that he planned to file within three years; had the IRS not communicated to the public in every publication available to laypeople that taxpayers have three years to file refund claims; had the IRS not delayed mailing its Notice of Deficiency until two years had elapsed from the due date; had the IRS not sent Taxpayer a menacing Notice of Deficiency and omitted the important information that if he filed a petition in the Tax Court he would forfeit his refund, Taxpayer would not be in the predicament of having to take his case all the way to the Supreme Court to obtain a refund of his admitted overpayment. As the Fourth Circuit said: "[I]t is completely unfair to deny a taxpayer his refund simply because the IRS failed to act quickly enough. Congress certainly did not intend for the taxpayer's ability to collect a refund in the Tax Court to turn on when the IRS mailed its Notice of Deficiency." (Pet. App. 19a).

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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